U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 11 August 2004

CASE NO.: 2003-LHC-02216

OWCP NO.: 01-154716

In the Matter of

MATTHEW E. BOLSTRIDGE
Claimant

v.

ATKINSON CONSTRUCTION COMPANY
Employer

and

THE TRAVELERS INSURANCE COMPANY
Carrier

Appearances:

James W. Case (McTeague, Higbee, Case, Cohen, Whitney & Toker), Topsham, Maine, for the Claimant

Richard F. van Antwerp (Robinson, Kreiger & McCallum), Portland, Maine for the Employer and Carrier

Before: Daniel F. Sutton
Administrative Law Judge

ORDER REMANDING CASE

I. Introduction

This proceeding arises from a claim for workers' compensation benefits filed by Matthew E. Bolstridge (the "Claimant") against Atkinson Construction Company ("Atkinson") under the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq*. (the "LHWCA" or "Act"). Specifically, the Claimant seeks an award authorizing bilateral carpal tunnel release surgery and compensation for anticipated periods of temporary disability following this surgery based on injuries allegedly sustained while he was employed by

Atkinson during the year 2000. The claim was referred to the Office of Administrative Law Judges ("OALJ") for hearing after an informal conference before the District Director of the Department of Labor's Office of Workers' Compensation Programs ("OWCP") failed to produce a mutually satisfactory resolution.

Pursuant to notice, a formal hearing was conducted before me in Portland, Maine on December 17, 2003, at which time the parties were provided an opportunity to present evidence and oral argument. The Claimant appeared at the hearing represented by counsel, and an appearance was made by counsel on behalf of Atkinson and its insurance carrier, The Travelers Insurance Company ("Travelers").[1] The Claimant testified at the hearing, and documentary evidence was admitted without objection as Claimant's Exhibits ("CX") 1-6, and Employer's Exhibits ("EX") 1-2. Hearing Transcript ("TR") 7-8. At the close of the hearing, the record was held open for a period of 60 days to afford the parties with an opportunity to offer additional evidence pertaining to an issue that arose at the hearing concerning the Claimant's employment subsequent to November-December 2000 when he was last employed by Atkinson. TR 74-75. After the hearing, the Claimant submitted the transcript of a February 2, 2004 deposition taken of Richard C. Flaherty, M.D. which was admitted without objection as CX 7. Neither party offered any additional evidence, and the Claimant's attorney proposed on behalf of both parties in a letter dated February 17, 2004 that March 18, 2004 be set as the deadline for filing post-hearing briefs. The parties' proposal was accepted, and briefs were received from both parties.[2] In addition, both parties filed reply briefs addressing each other's arguments on the subsequent employment issue. The record is now closed.

Upon review of record and the parties' arguments, I conclude for the reasons discussed below that the claim is not in a proper posture for adjudication because the evidence suggests that another party, namely, a subsequent employer which has not been joined, may be liable under the LHWCA for the Claimant's carpal tunnel syndrome. Accordingly, I will remand the case to the District Director for joinder of this employer and its insurance carrier as necessary parties.

II. The Facts

A. Background

The Claimant is a 34 year old carpenter who has worked in the carpentry trade since the age of 15. TR 19. He joined the Carpenters' Union around 1997 and has worked since that time on commercial and industrial construction projects. TR 19-20, 46. In April 2000, he was hired by Atkinson to work as a dock builder to work on the construction of a "land-level" facility used in the building of naval ships at the Bath Iron Works Corporation ("BIW") in Bath, Maine. TR 18, 20. The Claimant testified that the contract for this job required carpenters to perform "all the work out over the water" which involved a variety of tasks such as drilling, pipefitting and

[1] Atkinson and Travelers are referred to collectively herein as the Respondents.

[2] The Claimant's brief was timely filed on March 15, 2004, and the Respondents' brief was filed one week later on March 22, 2004. The Claimant has not objected to the late filing, and the Respondents' brief has been fully considered.

tying steel. TR 20. While he had some prior experience tying steel, this was the first job on which he had performed any pipefitting duties. *Id.*

On the Atkinson project at BIW, the Claimant's first assignment was to operate a 90-pound "rock hammer" which is a pneumatic jackhammer with an attached drill bit that he used to drill holes in "precast" pier sections. TR 21-22. He did this drilling work for four or five weeks. TR 22. The Claimant next worked on installation of "crane rails" which required him to use a heavy set of pliers and to push, pull and twist repeatedly with his hands during the course of the day to tie the crane rails with heavy gauge wire to anchors in the precast pier sections and to steel reinforcing bars. TR 24-29. The Claimant testified that he began to experience numbness, fatigue and burning in his hands as he performed this work over time. TR 29. He noticed these symptoms in both hands, but more so in the left hand which had given him similar problems in the past before he went to work for Atkinson, although not with the same severity and persistence that he experienced on the Atkinson job. TR 29-30, 56-57. He said that he would begin the day at Atkinson using his left hand which would eventually feel as though it was "going to sleep" and then switch to the right hand which eventually developed the same symptoms. TR 30-31. According to the Claimant, these hand symptoms progressed while he was working for Atkinson to the point where they lasted overnight and continued even after he left Atkinson's employment in November or December 2000. TR 31-32. At the time of the hearing, he testified that he continued to have aching and numbness in both hands, but loss of strength is what bothers him most. TR 33-34.

The Claimant left Atkinson as a result of a layoff in late November 2000 or early December 2000. Since that time he has continued working on a variety of construction projects. TR 34-36. He did some drywall work, using his left hand to apply the "mud" and both hands to operate a sanding pole. TR 49-50. He also worked on a remodeling project at the Maine State House where he built new door frames, using an air-powered nail gun and power "chop" saw. TR 51-52. In addition, he did concrete form work which he described as "hand intensive", erected staging and operated his own construction business. TR 52-54, 57-59.

Approximately a year and one half after he left Atkinson, the Claimant was employed by a company named "AGM" for a five or six week period during the year 2002 to work on a pier project in Provincetown, Massachusetts. TR 35-36, 59-60. He described the pier as approximately 400 feet in length and wide enough to accommodate a two lane asphalt and concrete vehicle roadway and two wooden pedestrian sidewalks, each approximately six feet in width. TR 59, 62, 65. According to the Claimant, the pier is a municipal facility which is used by the public, whale watching cruises, fishing charter boats and commercial fishing vessels. TR 60, 67. The pier extends entirely over the water and has slips for boats extending from its sides with docking for the larger commercial vessels at the outer end. *Id.* The Claimant's job involved use of a "tap gun" or "ram set" to secure plywood concrete forms to sections of precast material which was used to construct a concrete curb which separated the vehicular roadway on the surface of the pier from the pedestrian walkway. TR 61, 65. The Claimant testified that the purpose of the curb is to prevent vehicles from leaving the roadway and is not used in connection with the docking of any vessels. TR 65-66. The Claimant installed sections of curb in the area of the pier where the whale watching boats were docked, but he left the job before it was completed and, thus, was not sure whether the curb ran all the way to the end of the pier where

the commercial fishing vessels docked. TR 63. Although he denied that his work on this job involved intensive use of his hands, he testified that he experienced the same type of hand pain while doing this work that he had experienced since approximately January 1999. TR 61.

The Claimant first sought medical attention for his hands in January 2001 from his primary care doctor. TR 37, 47. He was also seen by a hand surgeon who recommended surgery on both hands. TR 39. He testified that he initially deferred the recommended surgery because he was involved in building a house, but he said that he was ready at the time of the hearing to go ahead and have the surgery done. TR 39-40.

B. Medical Evidence

Shortly after being laid off by Atkinson, the Claimant was seen on January 8, 2001 by Martha D. Stewart, D.O. who diagnosed right carpal tunnel syndrome and prescribed use of a brace. CX 3 at 8. As of January 29, 2001, Dr. Stewart reported that the Claimant's carpal tunnel syndrome had "greatly improved" so that she approved his request to discontinue use of the brace. *Id.* at 9. On March 16, 2001, Dr. Stewart stated in a note that it was her opinion that the Claimant has "right carpal tunnel syndrome as a result of the work he performed as an employee of Acherson [sic] Construction." *Id.* at 10. In December 2001, Dr. Stewart noted that the Claimant had bilateral hand numbness and had "self-referred" to Dr. Keebler for EMG testing. *Id.* at 11.

Peter J. Keebler, M.D. conducted an electrodiagnostic evaluation study on January 11, 2002 and reported that his findings were consistent with mild carpal tunnel syndrome, slightly worse on the right. CX 2 at 6. On January 25, 2002, the Claimant was evaluated by Richard C. Flaherty, M.D., a plastic and hand surgeon, at the request of his attorney. CX 1. Dr. Flaherty reported that the Claimant gave a history of significant numbness and paresthesia in his left hand dating back three years and probably longer, and an onset of similar symptoms in the right hand approximately one year earlier after doing a job where he repeatedly twisted heavy gauge wire abound reinforcing bars. *Id.* at 1. He recommended a surgical release procedure on both sides. *Id.* at 2. Dr. Flaherty saw the Claimant again in March 2003, at which time he wrote that the Claimant reported that his carpal tunnel symptoms had persisted on both sides. *Id.* at 4. Dr. Flaherty testified at a post-hearing deposition on December 18, 2003. He stated that based upon the Claimant's testimony at the hearing regarding the nature of his work at Atkinson, he felt that such employment "more likely than not" is implicated as a causal or aggravating factor in the Claimant's development of carpal tunnel syndrome. CX 7 at 5-6. On cross-examination, Dr. Flaherty testified that he was not aware that the Claimant had stopped working for Atkinson in late 2000 and that he had subsequently worked on other construction projects for approximately one year. *Id.* at 9-11. When given an accurate history that the Claimant had continued to work in the carpentry trade after he left Atkinson in late 2000, Dr. Flaherty stated that such continued work "perhaps" could have contributed to the carpal tunnel syndrome, depending on "the particulars" of the jobs. *Id.* at 12-13. Dr. Flaherty further testified that the only work activity the Claimant mentioned was the wire twisting that he did for Atkinson; however, he also stated that if the Claimant had continued to perform such typical carpentry activities as hammering, sawing and using power tools after he left Atkinson, these activities would be competent to contribute to the "cumulative effect" that results in carpal tunnel syndrome. *Id.* at 14.

The final item of medical evidence is a report dated November 10, 2003 from Peter R. Kimball, M.D. who was commissioned by the Respondents. EX 1. Although he agreed with Dr. Flaherty's surgical recommendation, Dr. Kimball stated that he did not believe that the Claimant's work activities for Atkinson accounts for his present need for surgery because (1) his symptoms existed before he went to work for Atkinson, (2) the symptoms were not aggravated sufficiently while he worked for Atkinson to require testing or surgery and (3) the symptoms continued for two years after the Claimant left Atkinson and worked for other employers and in self-employment. *Id.* at 2. For these reasons, Dr. Kimball stated that he also did not believe that the Claimant's employment at Atkinson was an "inciting activity" which made the recommended carpal tunnel release surgery necessary. *Id.* at 3.

III. Discussion

In their post-hearing brief, the Respondents urge denial of the claim on the following grounds: (1) the medical opinion from Dr. Kimball successfully rebuts the presumption afforded the Claimant by section 20(a) of the LHWCA that his carpal tunnel syndrome is causally related to his Atkinson employment, and the evidence of record establishes that the Claimant's employment with Atkinson did not cause his need for surgery or any anticipated post-surgical period of disability; or (2) since the evidence shows that the Claimant engaged in work activities subsequent to his employment with Atkinson that were competent to aggravate his carpal tunnel syndrome and since the Claimant worked for at least one employer who is subject to LHWCA jurisdiction after leaving Atkinson, the Respondents are relieved of any liability for either surgery or disability under the "last injurious exposure" rule. The Claimant responds that the "last injurious exposure" rule is not available to the Respondents as a defense because that doctrine only applies to occupational diseases and not to an injury such as carpal tunnel syndrome. Rather, the Claimant asserts, the Respondents bear the greater burden of demonstrating that his post-Atkinson progression of carpal tunnel syndrome was not a natural or unavoidable result of the injury he suffered while working for Atkinson, but the result of an intervening cause. I disagree.

Although he recognizes that the Benefits Review Board and courts have treated carpal tunnel syndrome as an occupational disease, the Claimant argues that the cases finding carpal tunnel syndrome to be an occupational disease are distinguishable because the Claimant's development of the syndrome was not an inherent hazard of his occupation as a union carpenter but rather a consequence of certain job duties (namely, operating a pneumatic rock hammer and tying crane rails with heavy gauge wire) that were peculiar to his employment at Atkinson. Claimant's Mar. 24, 2004 Response to Respondents' Brief at 1-2. In my view, the Claimant confuses causation with the definition of an occupational disease. While it may be that the Claimant's job duties while working for Atkinson contributed to the progression of his carpal tunnel syndrome to a greater degree than the other general carpentry duties that he performed before and after Atkinson's BIW project, that fact does not transform the syndrome from an occupational disease into an accidental injury under the LHWCA. The generally accepted definition of an occupational disease is "any disease arising out of exposure to harmful conditions of the employment, when those conditions are present in a peculiar or increased degree by comparison with employment generally." *Gencarelle v. General Dynamics Corp*., 892

F.2d 173, 176 (2d Cir. 1989), quoting 1B A. Larson, The Law of Workmen's Compensation § 41.00 at 7-353 (1987). The Claimant's carpal tunnel syndrome clearly meets this definition whether it was caused or aggravated by peculiar repetitive stresses on the Atkinson job alone or in combination with repetitive carpentry activities prior and subsequent to the Atkinson job, and classification of the condition as an occupational disease for LHWCA purposes is fully consistent with applicable precedent. *See Leathers v. Bath Iron Works*, 135 F.3d 78, 79 (1st Cir. 1998) (treating carpal tunnel syndrome as an occupational disease); *Bunge Corp. v. Carlisle*, 227 F.3d 934, (7th Cir. 2000) (ALJ's classification of carpal and cubital tunnel syndromes as occupational diseases supported by substantial evidence where record showed that repetitive biomechanical stresses inherent in the claimant's job to a peculiar or increased degree caused disease).

Since the Claimant's carpal tunnel syndrome is properly classified as an occupational disease, liability under the LHWCA is imposed on the employer during the period in which the Claimant was last exposed to "injurious stimuli" prior to the date on which he became disabled. *Liberty Mutual Ins. Co. v. Commercial Union Ins. Co*., 978 F.2d 750, 756 (1st Cir. 1992). In a case such as this, where a claim for medical benefits is filed before the Claimant actually becomes disabled, liability for medical care is imposed on the carrier on the risk at the last time that the worker was exposed to injurious stimuli prior to adjudication of the claim. *See Bath Iron Works Corp. v. Director, OWCP* (*Hutchins*), 244 F.3d 222, 229 (1st Cir. 2001). The injurious exposure required to shift liability to a subsequent employer and carrier need not qualify as an intervening injury; "[u]nder the 'last injurious exposure rule,' *any* exposure to harmful stimuli during an insurer's coverage period will lead to liability if the employee becomes disabled during that period by an exposure-caused injury, even if the most recent exposure was not the primary or triggering cause for the disability." *Id.* at 228-229 (quotation marks and italics in original). Therefore, all the Respondents need to do in order to avoid liability is show that the Claimant was exposed to stimuli sufficient to contribute to his carpal tunnel syndrome in employment covered by the LHWCA subsequent to the time that he left Atkinson in late 2000 and before he became disabled. *See Todd Shipyards Corp. v. Black*, 717 F.2d. 1280, 1285 (9th Cir. 1983) (last employer covered by the LHWCA to expose a worker to injurious stimuli is held liable for any benefits awarded under the LHWCA), *cert. denied*, 466 U.S. 937 (1984). *See also Stilley v. Newport News Shipbuilding and Dry Dock Co.*, 33 BRBS 224, 225-26 (2000) (following *Black's* last covered employer rule), *petition for review denied sub nom Newport News Shipbuilding and Drydock Co. v. Stilley*, 243 F.3d 179 (4th Cir. 2001).[3] As the Respondents correctly point out,

[3] It is noted that the First Circuit, in whose jurisdiction this matter arises, appears to have expressed some reservation about the "last covered employer" refinement of the "last injurious exposure" rule. *See Bath Iron Works v. Brown*, 194 F.3d 1, 6-7 (1st Cir. 1999) (stating in *dicta* that "[t]here is a difference between holding employers (and their insurers) liable for injuries that took place before an employee was hired and for those that took place after an employee left covered employment."). *See also* Junius C. McElveen, Jr. & Lawrence P. Postol, Compensating Occupational Disease Victims Under the Longshoremen's and Harbor Workers' Compensation Act, 32 Am.U.L.Rev. 717, 761-62 (1983) (arguing that the last covered employer rule "undercut[s] the basic rationale of the last employer rule, that each employer will be the last employer a proportionate share of the time."). However, the First Circuit has not specifically

the medical opinion from Dr. Kimball and the deposition testimony from Dr. Flaherty both support a finding that the Claimant's post-Atkinson carpentry work, which involved hammering, sawing and use of power tools, contributed in a cumulative manner to his carpal tunnel syndrome and present need for release surgery. In addition, the facts adduced to date indicate that at least one of the Claimant's subsequent periods of employment, the work he performed on the Provincetown pier, may be covered under the LHWCA. That is, a pier which adjoins the navigable waters of the United States is a generally regarded as a maritime situs covered by the LHWCA even if not presently used for maritime purposes. *See Hurston v. Director, OWCP*, 989 F.2d 1547, 1553 (9th Cir. 1993), *rev'd on other grounds* at 181 F.3d 1008 (9th Cir. 1999) (finding claimant lacked maritime status); *Trotti & Thompson v. Crawford*, 631 F.2d 1214, 1219 (5th Cir. 1980) (uncompleted pier under active construction is a covered situs). And, the Board considers those persons "directly involved in the construction, repair, alteration or maintenance of harbor facilities (which include docks, piers, wharves and adjacent areas used in the loading, unloading, repair or construction of ships)" to be harbor workers who possess maritime status under the LHWCA. *See Stewart v. Brown & Root, Inc.*, 7 BRBS 356, 365 (1978), *aff'd sub nom. Brown & Root, Inc. v. Joyner*, 607 F.2d 1087, 11 BRBS 86 (4th Cir. 1979), *cert. denied*, 446 U.S. 981 (1980). Thus, the record, as it currently stands, suggest that the parties liable for the Claimant's carpal tunnel syndrome are not the Respondents, but the Claimant's employer and that employer's insurance carrier for the period of time during which the Claimant was employed on the construction project at the Provincetown pier.

As discussed above, the Respondents argue that the claim against them should be dismissed because the Claimant has proceeded against the wrong parties. However, I find that dismissal of the claim at this point is premature. In *Susoeff v. San Francisco Stevedoring Co*., 19 BRBS 149, 152 (1986), the Board held that when the potential liability of a later covered employer becomes apparent in the course of a trial, the judge must halt the trial and require the claimant to file a claim against the newly discovered potential defendant, who may then request a new trial. *See also Avondale Indus., Inc. v. Director, OWCP*, 977 F.2d 186, 190 (5th Cir. 1992) (endorsing the approach recommended in *Suesoff*). In this case, where the evidence implicating the potential liability of the subsequent employer first surfaced during the hearing and was further developed thereafter, and where the subsequent employer and carrier have not had any opportunity to offer evidence and argument, I conclude that the appropriate procedure is to remand the case to the District Director with instructions that the Claimant file a claim against the subsequent employer. In the event that the matter is not informally resolved after joinder of all necessary parties, the case may be referred back to the Office of Administrative Law Judges for a formal hearing. I recognize that remand and the possibility of another hearing will inevitably delay adjudication and the surgery recommended for the Claimant's carpal tunnel syndrome, but the status of this record leaves me no alternative as I have no doubt that the Board would vacate any compensation order or denial entered in the present posture of the case.[4]

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rejected the approach taken in the *Black* and *Stilley*, and administrative law judges are bound by Benefits Review Board precedent until modified or overruled.

[4] My finding herein that the evidence of record requires a remand to the District Director for joinder of additional parties is not to be construed as an adjudication of any issue including liability, coverage of subsequent employment or timeliness of any claim brought against a

IV. Order

Based upon the foregoing, the following order is entered:

(1) the claim is hereby remanded to the District Director; and

(2) the Claimant shall file a claim against the employer for whom he worked on the Procincetown pier project.

SO ORDERED.

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DANIEL F. SUTTON
Administrative Law Judge

Boston, Massachusetts

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subsequent employer, as such determinations can only be made after all interested parties have been provided with notice of the claim and an opportunity for a full and fair hearing.